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8 IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
9 IN AND FOR THE COUNTY OF SKAGIT

10 WHATCOM COUNTY,

11 Petitioner,

12
13 v.

14 GROWTH MANAGEMENT HEARINGS
15 BOARD, WESTERN WASHINGTON
16 REGION,

17 Respondent.
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**Skagit County Superior Court
No. 14-2-00877-8**

(GMHB Case No. 12-2-0013)

**CERTIFICATE OF APPEALABILITY
(GRANTED)**

20 **I. REQUEST FOR CERTIFICATE OF APPEALABILITY**

21 This matter is before the Board on an Application for Direct Review by the
22 Washington State Court of Appeals in a case challenging the Board's April 15, 2014,
23 Second Order on Compliance. The case before the Court of Appeals is *Whatcom*
24 *County v. Growth Management Hearings Board, Western Washington Region*, Skagit
25 County Superior Court Cause No. 14-2-00877-8. The County's appeal concerns the
26 extent to which local jurisdictions must protect water availability and water quality.
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28 **II. PROCEDURAL BACKGROUND**

29 On August 7, 2012, Whatcom County adopted Ordinance No. 2012-032 which
30 amended the rural element of the County's Comprehensive Plan. Eric Hirst, Laura
31 Leigh Brakke, Wendy Harris, David Stalheim and Futurewise ("Hirst") challenged the
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1 ordinance in a petition to the Growth Management Hearings Board. On June 7, 2013,
2 the Board issued its Final Decision and Order (hereafter, "2013 FDO") in *Hirst, et al. v.*
3 *Whatcom County*, Case No. 12-2-0013. The Board found the ordinance did not include
4 measures limiting rural development to protect groundwater and surface water as
5 required by the Growth Management Act and remanded the ordinance to the County to
6 take action to comply with the GMA.¹ It further found petitioners did not meet the
7 standard for a declaration of invalidity.²

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9 On July 1, 2013, Hirst filed an appeal of the 2013 FDO in Thurston County
10 Superior Court, Case No. 13-2-01398-1. On July 3, 2013, Whatcom County filed an
11 appeal of the 2013 FDO in Skagit County Superior Court, Case No. 13-2-01147-9. Both
12 appeals addressed water resource issues decided in the 2013 FDO; the County's
13 appeal challenging the Board's finding of noncompliance with the GMA and the Hirst
14 appeal challenging the Board's refusal to impose invalidity as a remedy.

15 On July 26, 2013, the Board received applications for certification of
16 appealability. Whatcom County requested certification of the water issues raised in the
17 Skagit County Superior Court appeal.³ Whatcom stated the County had moved for
18 change of venue to consolidate both appeals before the Skagit County Superior Court.
19 Hirst requested certification of both the Skagit County and Thurston County appeals.⁴
20 Hirst indicated their intent to move for change of venue to consolidate the appeals
21 before the Thurston County Superior Court.

22 Concurrently with its appeal to the Courts, on January 28, 2014, Whatcom
23 County adopted Ordinance No. 2014-002 amending various Comprehensive Plan and
24 development regulations related to water resources. Petitioners objected to the
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28 ¹ 2013 FDO at 43-44.

29 ² 2013 FDO at 50.

30 ³ Request for Certification, filed by Whatcom County, July 26, 2013, in Skagit County Superior Court No.
31 13-2-01147-9.

32 ⁴ Application for Certificate of Appealability, filed by Hirst, July 26, 2013, in Thurston County Superior
Court No. 13-2-01398-1.

Application for Certificate of Appealability filed by Hirst, July 26, 2013, in Skagit County Superior Court,
No. 13-2-01147-9.

1 County's compliance efforts as not meeting GMA requirements. Following a
2 compliance hearing, the Board issued a Second Order on Compliance on April 15,
3 2014, finding the County in continuing noncompliance with the same issues raised in
4 the Board's June 7, 2013, FDO. The Board established a second compliance schedule
5 and set deadlines for compliance by January 2015.

6 On May 14, 2014, the County filed an appeal of the Second Compliance Order
7 with Skagit County Superior Court. On June 12, 2014, the Board received Whatcom
8 County's request for a Certificate of Appealability for Direct Review by the Court of
9 Appeals regarding the Board's Second Order on Compliance of April 15, 2014. On
10 June 23, 2014, the Board received the Hirst Respondents' Concurrence in Whatcom
11 County's Application for Certificate of Appealability stating they were not opposed to the
12 Board granting appealability.
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14 15 **III. AUTHORITY AND ANALYSIS**

16 The Administrative Procedure Act, RCW 34.05.518, sets forth the criteria and
17 procedures for Certificates of Appealability. RCW 34.05.518(3) identifies the Growth
18 Management Hearings Board as an "environmental board," and provides:

19 (b) An environmental board may issue a certificate of appealability if it
20 finds that delay in obtaining a final and prompt determination of the
21 issues would be detrimental to any party or the public interest and either:

22 (i) Fundamental and urgent statewide or regional issues are raised; or

23 (ii) The proceeding is likely to have significant precedential value.
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25 RCW 34.05.518(4) requires a board to state in its certificate of appealability "which
26 criteria it applied [and] explain how that criteria was met." This Board reviews the
27 request for certification in light of each of these criteria.
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1 **A. Detrimental Delay**

2 This case involves establishing how Whatcom County will protect rural character
3 by ensuring rural development does not further degrade water quality and impair water
4 availability. The Board agrees with the County and Hirst that delay in definitive
5 resolution of the water resource protection issues in this case would be detrimental to
6 each of the parties and to the public interest.

7 A prompt resolution of the pending appeals will allow the County to take decisive
8 action to achieve compliance. Delay is detrimental to the County's interest in enacting
9 plans and regulations that provide certainty for rural development and water resource
10 management. A quicker resolution is vital to the County's preparation for updating its
11 comprehensive plan and regulations as required by RCW 36.70A.130. As other
12 counties and cities begin updating their comprehensive land use plans, beginning in
13 2016, an appellate court decision on these issues will assist other jurisdictions as they
14 update their plans.

15 Respondents Hirst are harmed by a delay because additional development will
16 vest to the County's inadequate policies and regulations and will harm rural character
17 and fail to protect water quality and quantity.⁵ The public interest in protecting health
18 and the environment remains at risk from the ongoing rural development allowed in the
19 County while the issues are pending.

20 **The Board finds** delay in this matter would be detrimental to the interests of all
21 parties - Hirst and Whatcom County - and to the public interest.

22 **B. Fundamental and Urgent Statewide or Regional Issues Raised**

23 Water quality and availability are fundamental and urgent issues across the state.
24 Despite twenty years of Board adjudications of GMA petitions, the intersection of State
25 water law with the local land use plans and regulations reviewed by the Board is not
26 well defined. The Supreme Court's recent *Kittitas* decision addressed the obligation of
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32 ⁵ Concurrence in Whatcom County's Application for Certificate of Appealability (June 23, 2014) at 2.

1 local governments to protect water resources in the context of rural land use planning
2 and development regulations enacted under the GMA:

3 The GMA directs that the rural and land use elements of a county's plan
4 include measures that protect groundwater resources. RCW
5 36.70A.070(1), (5)(c)(iv). Additional GMA provisions, codified at RCW
6 19.27.097 and 58.17.110, require counties to assure adequate potable
7 water is available when issuing building permits and approving
subdivision applications.⁶ (emphasis added)

8 The *Kittitas* Court ruling involved the subdivision provision, RCW 58.17.100. In deciding
9 the Whatcom County challenge, the Board was also required to look to RCW 19.27.097,
10 the building permit provision, and to follow the *Kittitas* Court's mandate in light of the
11 facts and authorities in the record.

12 As the Supreme Court stated in *Kittitas* and the Board applied in the 2013 FDO
13 and its Second Order on Compliance, if it is up to local governments to make a finding
14 that there is "adequate water supply to support the proposed development,"⁷ a prompt
15 and authoritative resolution of this appeal will provide the necessary framework and
16 guidelines not just for Whatcom County, but for all local governments across the state.
17 The extent to which *Kittitas* authorizes or requires local governments to address water
18 availability for rural development is especially critical in areas where permit-exempt
19 wells are relied on for development in closed basins or where instream flows are not
20 being met.
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22 Local and state governments need certainty in their planning roles to ensure
23 protection of surface or groundwater resources. This matter requires an appellate court
24 decision to guide state and local agencies as they allocate funds, staff, and other
25 resources to address water issues under their jurisdiction.
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27 **The Board finds** this matter involves fundamental and urgent issues of
28 statewide importance.
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31 ⁶ *Kittitas County*, at 179.

32 ⁷ 2013 FDO at 23, 40.

1 **C. Significant Precedential Value**

2 RCW 34.05.518 (3)(b) requires the Board to find that the matter *either* presents a
3 fundamental statewide issue *or* is likely to have significant precedential value. The
4 Board has found that issues in the Second Compliance Order have fundamental and
5 urgent statewide importance; therefore the Board need not address the precedential
6 value of this matter. However, pursuant to RCW 34.05.518 (4), the Board responds to
7 the assertions of the applicants.

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9 The effect of the Supreme Court's *Kittitas* decision on local regulations applying
10 RCW 19.27.097, as well as the Board's findings with respect to water quality, are
11 important statewide issues that have never been directly decided by the appellate
12 courts. Prompt resolution of the matter will have significant precedential value,
13 especially for counties like Whatcom that are updating their comprehensive plans. Any
14 county that is embarking on its general update of its comprehensive plan will benefit
15 from clear, final guidance on this issue. A decision in this matter may also provide
16 precedent important to defining the relative roles of the Department of Health,
17 Department of Ecology, and local governments in protection of surface and groundwater
18 resources in rural areas.

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20 Thus, **the Board finds** judicial determination of the issues in this matter will likely
21 have significant precedential value.

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23 **IV. ORDER**

24 Having reviewed the application for Certificate of Appealability, the relevant
25 provisions of the Administrative Procedure Act, in particular RCW 34.05.518(3)(b), and
26 the facts of this matter, the Board finds that delay in obtaining a final and prompt
27 determination of the issues will be detrimental to all parties and to the public interest.
28 The Board further finds that a fundamental issue of statewide importance is raised and
29 that a judicial determination is likely to have significant precedential value.
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1 Having found the criteria of RCW 34.05.518(3) are satisfied, the Board issues a
2 Certificate of Appealability for direct review in Skagit County Superior Court Case No.
3 14-2-00877-8.

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5 Entered this 26th day of June, 2014.

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7 _____
8 Nina Carter, Board Member

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10 _____
11 Margaret Pageler, Board Member

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13 Unavailable for Signature
14 Raymond Paolella, Board Member